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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. ~~283~~ 33

THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND THE TEXARKANA & FORT SMITH RAILWAY COMPANY

vs.

ROAD IMPROVEMENT DISTRICT No. 3 OF SEVIER COUNTY, ARKANSAS, ET AL.

In Error and on Writ of Certiorari to the Supreme Court of the State of Arkansas.

BRIEF OF PLAINTIFFS IN ERROR.

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vs.

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In Error and on Writ of Certiorari to the Supreme Court of the State of Arkansas.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT.

The plaintiffs in error herein (for convenience referred to as the plaintiffs) seek a reversal of the judgment of the Supreme Court of Arkansas, which affirmed an assessment of benefits in the sum of $21,270 upon plaintiffs' railroad property in a road improvement district in Sevier County, Arkansas.

A unpaved public highway extended from DeQueen, Arkansas, easterly a distance of about 18 miles. It was proposed to improve this highway by giving it a hard surface, and accordingly, under Act 338 of the 1915

session of the Arkansas legislature, the defendant Road Improvement District No. 3 was organized, the boundaries of which are shown in Exhibit A (Rec. 164). The district was some 18 miles long, extending easterly from DeQueen, and approximately six miles wide. As originally established, the district did not include any part of the city of DeQueen, nor any part of the railroad property of the plaintiffs. Afterwards, as appears from Exhibit B (Rec. 186), the boundaries of the district were extended westward so as to include a part of the city of DeQueen, thus taking in the tracks and other property of the plaintiffs and making them subject to the assessment of benefits. It was estimated that the cost of the proposed improvement would be $200,000 (Rec. 259), and it was intended that bonds would be issued by the district in that amount and the proceeds used in making the improvement. The total assessed value of the acreage and town lots in the district, for state and county purposes, was $897,660, and the benefits assessed thereon were $488,354 (Rec. 244). Benefits aggregating $510,033 were assessed against all the property in the district (Rec. 32-144).

Benefits were assessed against the plaintiffs as follows: The sum of $7,000 for two miles of main track, with an assessed valuation of $54,000; the sum of $5,000 for 9¾ miles of side track, with an assessed valuation of $29,250, and the sum of $9,270 for buildings, with an assessed valuation of $46,265, or a total benefit assessment of $21,270. The assessed valuations were those made by the State Tax Commission. This assessment was upheld by the lower court (Opinion, Rec. 307), and in the Supreme Court of Arkansas (Opinion, Rec. 311). There was no evidence that the proposed improvement would directly benefit any of the property of the plaintiffs. The sole ground for the assessment was a sup-

posed indirect benefit to their property arising from a prospective increase in their traffic, due to the proposed improvement.

The local situation may be briefly stated as follows: The line of the plaintiffs extends generally from Kansas City, Missouri, southward to Port Arthur, Texas, on the Gulf of Mexico, running through Sevier County, Arkansas, and extending for a distance of two miles through the district. The line in Sevier County is owned by the Texarkana & Fort Smith Railway, and operated by the Kansas City Southern Railway Company. DeQueen is a city of 2,715 people (Census 1920). The only other towns in the district are Lockesburg, with 798 inhabitants, and Geneva, with 62. The freight division terminals of the plantiffs are located at DeQueen, and there are, in the district, in addition to two miles of single main track, 9.56 miles of yard tracks, referred to in the assessment as "side track" (Rec. 166), and also a depot, roundhouse, yard office, section house, water tank, oil storage tank, tool house, store house and mechanical department buildings (Rec. 264), used exclusively for railroad purposes.

The DeQueen & Eastern Railway Company owns and operates a line of standard gauge railroad, extending east from DeQueen beyond the eastern limits of Sevier County and running through Geneva and Lockesburg, substantially parallel with the public highway in question. The Texas, Oklahoma & Eastern Railroad, a standard gauge railroad, owned by the DeQueen & Eastern Company, is operated westerly from DeQueen, and extends to a junction with the Frisco, a distance of about 50 miles.

The Bank Head highway shown on the map is a hard surface road, extending from DeQueen easterly beyond the eastern boundary of Sevier County, and also ex-

tending west from DeQueen. The Wilson highway is a hard surface road, extending north and south from DeQueen. Road No. 7 crosses the district at right angles, and is either paved or in process of paving. The territory within the district is an old, settled farming country, divided into small holdings. Of the tracts of farm lands assessed with benefits, 246 were 80 acres or more in area, and 1,587 under 80 acres in extent. The tracts were assessed for general tax purposes at uniform rates per acre. The main agricultural product has, in the past, been cotton. The testimony was that the growing of cotton was being abandoned and the land was being more and more devoted to the production of fruits and vegetables, referred to by the witnesses generally as "truck farming."

Reasons were given why this road, although running substantially at a right angle to the railroad of plaintiffs, would not increase traffic over it to any great extent, if at all. The district has been settled many years, and a large part of the available land is already under cultivation. The cultivation of fruit and vegetables is brought about to a very considerable extent by substituting these crops for cotton. Fruit and vegetables must be loaded and put under refrigeration as quickly as possible, and this will cause the greater part of the carload shipments to be loaded at Lockesburg on the line of the DeQueen & Eastern Railroad. These shipments may ultimately reach the line of the plaintiffs at DeQueen, or they may be transported over a railroad affiliated with the DeQueen & Eastern to the junction with the St. Louis-San Francisco Railroad, which is about fifty miles west of DeQueen. Products may move eastward from the district to the town of Nashville on the Missouri Pacific, and be shipped over the latter railroad. The Bankhead highway and road Number 7, both

of which are improved, or are being improved, would receive some of the travel, from Road District Number 3. Only one witness for defendant testified as to the amount of traffic. He did not testify that there had been an increase, and all the carload shipments he testified to were shipped over the DeQueen & Eastern at Lockesburg. (Rec. 285 *et seq.*) Road No. 3 was not yet completed, at the time the case was tried, so that an increase in traffic, if any, could not be said to be due to road Number 3.

It was also testified that, in this region, the hard surfaced roads paralleling the plaintiffs' line had taken away the local business of plaintiffs, which now moved by motor trucks, and that even roads running at right angles to plaintiffs' line, such as road Number 3, would, by connecting up with cross roads, enable the trucks to reach more towns, and further decrease the local business of the railroads (Rec. 227).

The statute under which the proceeding was had lays down no specific method by which benefits are to be determined. It provides that "the assessors shall assess the benefits to be received by the various and particular tracts of land, railroads, tram roads and other real property within the district by reason of the improvement" (section 5421, Crawford and Moses Digest of the Statutes of Arkansas, 1921). The same section requires the assessors to show in the assessment roll the name of the owner, the subdivision of the land, the number of acres, the present assessed value, the assessed benefits per acre, and the total assessed benefits to each tract. As to railroad property, the same section requires the assessors to show the name of the railroad owner, the mileage "in the district," the present assessed value of the railroad "and the amount of assessed benefits per

mile," and the total amount of benefits assessed against said railroads.

It appears from the testimony of the assessors, who assessed the benefits (Rec. 28, 29, 259), that the commissioners of the road district advised the assessors "how much benefits they wanted to raise in the district." Accordingly, the assessors computed the rate it would take to raise this amount of benefits, and divided the district into zones, and made the assessment accordingly. They had not at the time been definitely told the kind of road contemplated by the proposed improvement. The assessors testified that as to non-railroad property, they assessed as benefits 60, 50 or 40 per cent of the assessed value on the property located in zones 1, 2 and 3 (Rec. 30). They also stated that in making their assessment, they differentiated between improved and unimproved property; but the assessment roll (Rec. 57, *et seq.*) demonstrates that this is true only in exceptional cases. As to railroad property, their assessment of benefits was without any rule or principle, except what they thought was right and fair.

The average assessment for general taxation of all the acre property in the district was $6.432 per acre. As a matter of fact, the market value of the lands in the district, according to one of the assessors, was from $25 to $50 per acre (Rec. 276). The assessment of the property of plaintiffs was on a 50 per cent. basis, that is, it was assessed at 50 per cent. of its true value.

There was a large amount of testimony to the effect that the proposed improvement of the highway in question, while of benefit to the farm land within the district by giving the farmers better access to market, would not benefit in any way the property of the plaintiffs within the district, consisting, as above stated, of main track, terminal yards, and the usual terminal structures. On

the other hand, there was testimony adduced by the district to the general effect that the paving of the highway, while not increasing the agricultural products within the district, would facilitate the hauling of them to the railroads and to market generally, and thereby increase the traffic which the plaintiffs would enjoy, and it was argued that this prophetic increase in traffic would constitute a benefit to the railway property in the district, and so justify the assessment. The assessment of benefits to the property of the plaintiffs rests, in the judgment of both State courts, upon the indirect benefit arising, or supposed to arise, from an increase in traffic to be realized in the future. In other words, the judgment of the State courts rests upon the assumption that the prospect of such increased traffic has actually benefited the property of the plaintiffs *within the district* by increasing its value in the sum of $21,270.

This we contend, is unreal and fanciful, and has no support in fact. We further contend that the assessors, in their assessment of benefits, applied one rule to non-railroad property and an entirely different rule to railroad property, and in so doing arbitrarily discriminated against the plaintiffs to such a shocking extent as to invalidate their assessment under rules of law well settled in this Court. The case is here on writ of error, and also upon petition for writ of certiorari.

Plaintiffs' right to a writ of error is amply supported by the decision of this court in the case of *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6*, 256 U. S. 658, the situation, in the two cases, being substantially the same. In that case this Court said:

> Petitioners duly maintained that the assessment upon their property was unequal, arbitrary, unreasonable and in violation of the due process

and equal protection clauses of the Fourteenth Amendment. The state courts held to the contrary, and in effect declared the statute providing for the Road Improvement District authorized the action taken by the Board and that so construed it was a valid enactment. 139 Ark. 424, 215 S.W. 656; 217 S.W. 773. The validity of the statute having been adequately challenged, the cause is properly here upon writ of error and the petition for certiorari will be denied.

Plaintiffs specify the errors relied upon as follows:

SPECIFICATION OF ERRORS.

1. The Supreme Court of Arkansas erred in affirming the assessment of benefits against the property of plaintiffs.

2. The Supreme Court of Arkansas erred in refusing to hold that the assessment of benefits against the property of plaintiffs was so arbitrary and so grossly excessive as to violate the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of Arkansas erred in refusing to hold that the assessment of benefits against the property of the plaintiffs was relatively unequal and discriminatory because not made on a uniform basis as compared with the assessment of other property in the district, and that it, therefore, violated the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Arkansas erred in holding that the action of the state legislature in attempting to validate the assessment against the property of the plaintiffs had the effect of curing its invalidity.

ARGUMENT.

I.

The assessment in this case is so plainly arbitrary, and so grossly excessive as to amount to confiscation of the property of Plaintiffs.

It is undoubtedly true, as this Court said in *Branson* v. *Bush*, 251 U. S. 181, that anything which develops the territory that a railroad serves must necessarily be of benefit to it, and that no agency for such development equals that of good roads.

It is also a matter of common experience that, in many instances, good roads have the effect of diverting traffic from railroads to motor vehicles. In the case of the highway in question, it would be natural to expect that it would facilitate the hauling of traffic to Lockesburg, on the DeQueen & Eastern, for shipment by rail at that point. This line connects with the plaintiff's road at DeQueen, and also with the Frisco at Valliant, located some fifty miles west of DeQueen. It would be to the interest of the DeQueen & Eastern to give itself the benefit of the long haul to Valliant on shipments to distant points which could be routed by the Frisco and its connections. It also appears that there is a fairly good road from the eastern end of the highway in question to Nashville, a station on the Missouri Pacific, and that some farm products from the district in question now go to Nashville (Rec. 243). It is apparent, therefore, that any increase in traffic coming from the district in question would be shared by the DeQueen & Eastern, the Frisco and the Missouri Pacific, as well as by the plaintiffs. What change the future may bring in the way of building highways beyond those now being con-

structed or improved, or the building of railroads, is too uncertain to be the subject of speculation.

Let us assume, however, for the sake of the argument and in deference to the opinion of the State courts, that, balancing the traffic diverted from the plaintiffs against what they would gain by the improved highway, there would be a net balance in favor of the latter; in other words, that there would be a net increase in freight or passenger earnings, or both, caused by the improvement. It was not claimed in the State court, and in the nature of things it cannot be claimed, that any benefit will accrue to plaintiffs' railroad except such as arises from this theoretical and speculative increase in traffic. It is obvious that the physical property of the railroad, consisting of its right of way, tracks and buildings within the district, will not be in any way benefited by the improvement; its value will not thereby be enhanced.

The precise question, therefore, is whether this assumed increase in traffic, caused by the improvement of the highway in question, will so enhance the value of the railroad within the district as to justify an assessment of $21,270. It is to be borne in mind that the only justification for the assessment is a supposed corresponding increase in the value of the railroad within the district. If its value is not enhanced to this extent, the assessment is in violation of the Fourteenth Amendment.

The value of railroad property bears a relation to the income which it affords. Undoubtedly, a permanent increase in profitable traffic will tend to increase the value of a railroad as an entirety, and this value will be distributed or spread over the entire line. The value of a railroad results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. This rule is no longer open to question in this Court.

This Court, in *South Utah Mines & Smelters* v. *Beaver County*, a tax case decided May 21, 1923, held that the value of property does bear a relation to its income, saying:

> The value of property bears a relation to the income which it affords. If it be property whose production is uniform and of indefinite duration the capitalization of the net income derived from it at the going rate of interest, in the absence of a more certain method, will furnish a reasonable measure of the value.

In *Branson* v. *Bush*, *supra*, the same principle is stated, where the value of railroad property was under consideration, the court saying, quoting from *R. R. Co.* v. *Backus*, 154 U. S. 439:

> But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value.

In *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, a lock and dam in the Monongahela River were condemned by the Government, and the question arose as to the compensation to which the owner was entitled. It was held that the owner was entitled to "the full equivalent therefor," and this was measured by the value of the property, and this value was largely determined by the earnings of the property. The court said (p. 328):

> How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The value of the property, generally speaking, is determined by its productiveness —the profits which its use brings to the owner. . . . The value, therefore, is not determined by the mere

cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others, the owner is entitled to a reasonable compensation, and the number and amount of such uses determines the productiveness and the earnings of the property, and, therefore, largely its value.

In *Omnia Commercial Co.* v. *U. S.*, decided by this Court on April 9, 1923, reference is made to the *Monongahela* case, *supra*, and after quoting therefrom, the court said:

> The lock and dam constituted, in effect, a going concern, whose value was of course affected by what it would produce.

In *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185, the property of an express company, both intangible as well as tangible, had been assessed at $4,189,818. The value of its tangible property was $1,159,491. The company insisted that it should be assessed only at the lower figure; but this contention was denied by the court, saying:

> It is worth $4,189,818 for the purpose of income to the holders of the stock and for the purposes of sale in the markets of the land.

In *St. Louis & East St. Louis Electric R. Co.* v. *Missouri*, 256 U. S. 314, the question was the value of .346 of a mile of track in the State of Missouri, assessed at $186,019, of which $13,019 represented tangible, and the remainder intangible property. It was objected that the assessment should be limited to the value of the tangible property, but it was held that the company possessed certain valuable contracts which gave to its property a greater earning power, and therefore a higher value, the court saying:

It was these contracts which gave the company's small extent of physical property an earning capacity, and therefore a value.

Assuming, therefore, that increased earnings make for increased value of railroad property, and assuming, further, that the improvement of the public highway in question will theoretically, and perhaps actually, increase to some extent the traffic of the railroad, and hence increase to a corresponding extent its value, will the enhanced value of the railroad property within the district be sufficient to justify the assessment made against it? Our contention is that an analysis of the situation, guided by these principles, amounts to a complete demonstration that the supposed enhancement in value of the railroad within the district is so negligible and trivial as to make the assessment here in question a mere travesty.

It is fundamental that no benefit can be assessed against property outside of the Road Improvement District. "To do so under any formula," said this Court in *Union Tank Line* v. *Wright*, 249 U. S. 274, "would violate the due process clause of the 14th Amendment." The same principle finds ample illustration in *Fargo* v. *Hart*, 193 U. S. 490. Under the express terms of Section 11 of the Act in question, the assessment of benefits is limited to the "railroad and other property *within the district* by reason of the improvement." If the property of other persons outside of the district is benefited, no assessment is to be made against it. As an illustration, the property of the Frisco which is operated through Valliant, will probably receive benefits as great, if not greater, than those received by the plaintiffs, but its property is outside the limits of the improvement district, and hence no assessments may be made against it. The final question, therefore, is, will there be any en-

hancement in value of the railroad's property *within the district*, caused by the proposed road improvement, sufficient to justify the assessment made? The effect of the increased traffic due to the improvement of this highway cannot in the nature of things be limited to the railroad property within the district. The segment of the railroad within the district is "a part of the railroad unit" (*Branson* v. *Bush, supra*). The value of the property of the railroad necessarily rises and falls as a unit. As this Court said in *Branson* v. *Bush*:

> It is practically impossible—at least in respect to railroad property—to divide its value, and to determine how much is caused by one use to which it is put and how much by another.

To take an extreme illustration, assume the discovery of oil or other mineral in large quantity adjacent to the track of the railroad in Sevier County, Arkansas, and the sudden and extraordinary increase in traffic occasioned thereby. This would not increase the value of the railroad adjacent to the oil wells or the mines over and above any other piece of track in the railroad system. The earnings from this traffic would be enjoyed by the railroad as a unit, and whatever increase in value might be occasioned thereby would be distributed and spread over all the mileage under one operation and control.

This court said in the *State Railroad Tax* case, 92 U. S. 579, 608, quoted in *Branson* v. *Bush, supra*:

> It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road and apportion the value within the county by its relative length to the whole.

"Every mile," said this Court in *Fargo* v. *Hart*, *supra*, "is a necessary condition of the use of the rest of the line beyond, and therefore a reflex condition of the value of the line behind it."

The assessment of railroad property for State and county purposes by the State of Arkansas recognizes that the value of the entire railroad is a unit, and it assesses within the State, and within each political subdivision, that portion of the value which the mileage bears to the entire mileage. In 1911 (Acts, Arkansas, 1911, page 233), the State enacted a law for the assessment and taxation of all property, tangible and intangible, of railway companies. In Section 1, it is provided that the Tax Commission

> shall ascertain the value of all property, tangible and intangible, including the franchises (except the right to be a corporation), railroad tracks, rolling stock, etc.

Section 2 provides:

> The franchises (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible.

Benefits to plaintiffs' property in the sum of $7,000 are assessed against two miles of main track, having an assessed valuation of $54,000; benefits in the sum of $5,000 are assessed against 9¾ miles of side track having an assessed valuation of $29,250; and benefits in the

sum of $9,270 are assessed against buildings in DeQueen having an assessed valuation of $46,365. The State Tax Commission, in compliance with the statute, has assessed the side track and buildings separately from the main track, but it is obvious that these side tracks and buildings cannot, by any stretch of the imagination, be benefited—that is, enhanced in value—by increased traffic, except as they may be considered as a part of the entire transportation unit. The most favorable view of the matter, therefore, is to treat the side tracks and buildings as a part of the main line mileage within the district, and to assign the entire benefit assessment, $21,270, to the two miles of main line.

The valuation of $10,635 per mile, used by the assessors in this case, represents the Arkansas mileage proportion of the entire value of the system. "There are," as this Court said in *Louisville & Nashville R. Co.* v. *Greene*, 244 U. S. 522, 540, "two recognized methods, known as the stock-and-bond plan and the capitalization-of-income plan" of determining the value of railway property as an entirety. After this value has been ascertained, it becomes a simple problem to assign to the State of Arkansas and to its several subdivisions their proportion of value on a mileage basis.

Assuming an increase in traffic at DeQueen by reason of the proposed improvement (which is a doubtful assumption), and that such traffic will be profitable, and that the result will be to increase the value of the entire railroad property, 800 miles long, and bearing in mind that only the enhancement in value within the district itself can be assessed with benefits, we proceed to inquire how much increase in traffic the railway company will have to realize, from that source, in order to justify the proposed assessment.

Let us assume, for purposes of illustration, that the railroad will enjoy an increased annual gross revenue at DeQueen (the only station in the district), due entirely to the proposed improvement of the highway, of $1,000 per year (which is probably excessive), and that the operating ratio is 75 per cent., *i. e.*, of each dollar of gross revenue, 75 cents represents expenses and 25 cents represents net revenue or profits. (The average operating ratio for the five-year period ending December 31, 1920, was 76.27 per cent., Rec. 169.) There would result a net revenue, or profit, of 25 per cent. of this gross revenue, amounting to $250 per year. This net revenue, or profit, would necessarily be spread over the entire mileage of 800 miles. The segment within the district, two miles long, is .25 of one per cent. of the entire mileage. The amount of net earnings, or profits, assignable to the two miles within the district (.25 of one per cent. of $250), would be $0.62. If we capitalize at six per cent. these net earnings, or profits, amounting to $0.62, in order to ascertain the value which they may be said to represent, the result is $10.33. This would represent the increased value of the two miles of railroad property within the district, arising from an annual increase of $1,000 in freight and passenger gross revenue at DeQueen.

If we assume that the annual gross revenue from traffic in the district is increased tenfold over the sum used in the foregoing illustration, the result would be an enhancement in value of the railroad property within the district of $103.33.

If we assume an increased annual gross revenue of $100,000 due to the improvement (which is greater than the extreme figures used in the opinion of the Court (Rec. 308), and which of course, is so large as to be absurd), this would represent an enhancement in value

of the railroad property within the district of $1,033.33, which is less than five per cent. of $21,270, the amount of benefits actually assessed.

Let us now consider this assessment of $21,270, which, if valid at all, must necessarily represent an enhancement in value of the two miles of railroad property within the district resulting from an enhancement in the value of the entire property. This is at the rate of $10,635 per mile, and this sum multiplied by 800, the total mileage of the system, gives a total of 8,508,000 increase in the value of the entire line, due to the problematical and speculative increase in traffic. It is interesting to compute the extent of the supposed increase in traffic, from this road improvement, which would be necessary in order to create this enormous increase in value. It involves a steady and continuing annual profit from increased traffic of $510,480 a year, on a six per cent. basis; and if the operating ratio be taken at 75, the total gross income required, on increased traffic coming to the plaintiffs each year in the future, from the road district, would be $2,041,920.

In this connection, it is important to bear in mind that the population of DeQueen is 2,715 people, according to the census of 1920. The only other towns in the district are Lockesburg, with 798 inhabitants, and Geneva, with 62. The total gross revenue received by the plaintiffs from carload shipments of fruits and vegetables from DeQueen, Arkansas, for 1915 was $1,142.72; for 1918, $411.64; for 1920, $3,260.80 (Rec. 219). The corresponding amounts received by plaintiffs at DeQueen from the DeQueen & Eastern, for the same years, are, respectively: $1,538.51; $1,417.26, and $3,146.54. The comparison is shown on fruits and vegetables since they are the chief items of traffic from this district.

We earnestly contend that, under these circumstances, it is nothing short of a travesty to sustain an assessment of $21,270 against the property of the plaintiffs. It is fully recognized that in making local assessments certain inequalities will necessarily arise, due to the very nature of the proceeding, which it is not the policy of the law to undertake to rectify. But this is not an inequality of that character. It is a gross, glaring injustice, which comes clearly within the rule of *Kansas City Southern Railway Co.* v. *Improvement District*, 256 U. S. 648; *Thomas* v. *Kansas City Southern Railway Co.*, 43 Sup. Ct. 440; *Norwood* v. *Baker*, 172 U. S. 269; *Myles Salt Co.* v. *Iberia Drainage Dist.*, 239 U. S. 478; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55; *Missouri Pacific R. Co.* v. *Road Improvement District*, 288 Fed. 502, and *Board of Directors* v. *Miller Pipe Line Co.*, 292 Fed. 474. It is, to quote the language of this Court in *Branson* v. *Bush, supra*:

> a flagrant abuse, and by reason of its arbitrary character the mere confiscation of particular property.

The case, we respectfully submit, comes squarely within the rule of *Kansas City Southern Railway Co.* v. *Road Improvement District, supra*, where the Court said (256 U. S. 661):

> It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all.

And also within the condemnation of *Thomas* v. *Kansas City Southern Railway Co., supra,* where it is said:

> But vague speculation as to future increased traffic receipts will not justify a basis of taxation which necessarily produces manifest inequality.

The assessors were acting under Section 11 of the Alexander Law, which required them to

> assess benefits to be received by the several and particular tracts of land, railroads, tram roads, and other real property within the district by reason of the improvement.

The law gave them no standard or guide by which to proceed. They were not instructed to make their assessments on an area basis, or an assessment basis, or a valuation basis, or to include or exclude improvements, or to assess benefits to railroad property in accordance with enhanced values arising from increased traffic caused by the proposed improvement. They were without chart or compass, and with no guide except their own uncontrolled discretion. It is no wonder, therefore, that they adopted one basis for farm lands and an entirely different basis for railroad property. No one knows how they arrived at $10,635 a mile. They, themselves, do not undertake, in their testimony, to disclose the process. Probably there was no process except a desire to give to the railroad company a generous share of the burden. It was an administration of the law which amounts to a violation of rights under the 14th Amendment.

It is respectfully submitted that the assessment must bear some reasonable relation to the benefits which the property is to receive from the proposed improvement. If it be conceded that an enhancement in value arising from increased traffic is a benefit, such enhance-

ment should be measured in some rational way. It is not a compliance with the spirit of the law to "lump off" arbitrarily, or guess at the benefits which a railway company may be supposed to receive. This is particularly true when, as in the present case, the assessment actually made, when examined in the light of logic and reason, leads to the absurd conclusion that the improvement of this insignificant highway in Arkansas will result in increasing the value of the property of the plaintiffs in the sum of $8,508,000.

The gross inequality which results, in practice, from an enforcement of the same law in adjoining counties affords a most cogent reason for placing some lawful and reasonable limit upon the unregulated discretion of assessors in assessing the property of railway companies with an increasingly larger proportion of the cost of public improvements. In the present case, the assessed benefits were $10,635 per mile. In the neighboring county of Lafayette, in the same State, and acting under the same law, the benefits assessed against the St. Louis Southwestern Railway Company were $2,000 per mile of main line; $1,000 per mile for side tracks, and $1,500 per mile on the Shreveport Branch (*St. L. S. W. Ry. Co.* v. *Com'rs.*, 265 Fed. 524, 528). The total assessment was $49,706. The District Court of the United States reduced the assessment to $54 per mile. The aggregate assessment was reduced from $49,706 to $10,485. These two proceedings were under the same law. Each was for the construction of a public highway. The same procedure was employed in both. In one case, the assessed benefits are $10,635 per mile, and in the other case, $54 per mile. Other instances where assessments in this same state were so arbitrary in character as to call for correction in reported cases will be found in *Kansas City Southern Railway Co.* v. *Road Improvement Dist., supra; Thomas*

v. *Kansas City Southern Ry. Co., supra;* same case below, 277 Fed. 708; *Thornton* v. *Road Improvement Dist.*, 291 Fed. 518; *Road Improvement District* v. *Missouri Pacific R. Co.*, 275 Fed. 600; *Missouri Pacific R. Co.* v. *Road Improvement Dist.*, 288 Fed. 501; *Board of Directors of Miller County* v. *Pipe Line Co.*, 292 Fed. 474.

It is inevitable, from the very fundamentals of human nature, that the assessors in a local improvement district who are themselves property owners within the district, will be generous in lightening the burdens of individual property owners and transferring them to railroad and other public utility property. It may safely be assumed that this spirit of generosity will continue, unless some authoritative rule is laid down which shall define limits beyond which this unequal distribution of burdens may not go.

The interest of the railway companies is not limited to this one proceeding. It is a matter of general knowledge that not only Arkansas but other states have embarked upon an extensive program for road improvement. However commendable this movement may be, its burdens should be distributed with some semblance of fairness and justice. In the past, unequal and discriminatory assessments have been placed upon railway property, and, in the main, they have been paid in full or paid as a result of a compromise; but the inequalities and discriminations doubtless will continue in the future unless some lawful limit shall be established. In this particular district, other public highways may be constructed or improved and further doubtful benefits be conferred upon the property of the plaintiffs. Still other improvement districts have been created in other portions of the state, as well as in adjoining states, and other highways projected and constructed. It is a subject of great importance not only to plaintiffs, but to all

common carriers located in a country in progress of development.

If the contributions to be made by common carriers to the cost of road improvements are to be limited, as near as may be, to the actual benefit or actual enhancement in value of their property within the district, it is important that reasonable rules for ascertaining such benefits should be authoritatively determined, and the present case affords justification for our request that this be done.

II.

The use by the local assessors of the State Tax Commission's assessment of plaintiffs' railroad property, which included both tangible and intangible values, as the basis for the assessment of benefits, was arbitrary and wholly unwarranted, since the value of their tangible property in the District could not be enhanced or benefited by a prospective increase in traffic.

We are not unmindful that in *Branson* v. *Bush, supra,* an assessment of benefits in a road improvement district, based upon the assessment of railroad property by the State board, was upheld against the claim that this resulted in "a higher rate of taxation," but we contend for reasons hereafter stated, that this ruling is not in conflict with the proposition above stated.

The distinction between tangible and intangible values is pointed out by this Court in *Baker* v. *Druesedow,* decided November 12, 1923, where, in approving the segregation and assessment of intangible values for purposes of general taxation, it is said:

> Intangible values of a railroad company have been declared by the highest court of the State to mean "the values of the railroad properties above

the value of its physical assets." *Missouri, Kansas & Texas Ry. Co.* v. *Shannon*, 100 Texas 379, 390. Under the statute the value of the intangible is to be determined by deducting the value of the tangible from the value of the entire railroad property.

In the Texas case cited, the court, in addition to the language quoted, adds, "intangible values ordinarily result from the profits of its business as actually conducted." The statutes of Texas there under consideration provided for the separate taxation of tangibles and intangibles, the former being determined by the county authorities and the latter by the State authorities.

The subject of intangible values was elaborately considered in *Adams Express Co.* v. *Ohio*, 166 U. S. 185. It is there said:

> Whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property.

In *Union Tank Line* v. *Wright*, 249 U. S. 275, the court said:

> While the valuation must be just, it need not be limited to the mere worth of the articles considered separately, but may include as well "the intangible value due to what we have called the organic relation of the property in the state to the whole system."

Other states than Texas have similar provisions for the separate determination and assessment of tangible and intangible property. Intangible property is the difference between the value of property as an entirety

and the value of its physical assets. The law of Kentucky relating to this feature was before this Court in *R. R. Co.* v. *Greene*, 244 U. S. 522.

The statutes of Arkansas (section 9975, Crawford and Moses Digest of the Statutes of Arkansas, 1921), likewise provide for the taxation for general purposes of both tangible and intangible values of railroad property, as follows:

> The franchises (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies are declared to be property for the purpose of taxation, and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible.

It is apparent from the above quoted statute that the State taxing officers are not only to "consider" the franchises of a railway company in making their assessments, but that they "shall" determine the total value of the entire corporation, tangible and intangible. Other provisions (sec. 9989, 9993) require this aggregate value of tangible and intangible property to be spread over the line in the State on a mileage basis; and the assessed value allocated to any county is the assessment on which taxes are levied by the local taxing officers.

It appears to be the general policy of the State to subject intangible, as well as tangible, property to taxation. Section 9965 provides for the separate assessment of the intangible property of all corporations, except public utility corporations whose property is assessed by the State Tax Commission, the purpose being, as expressly stated in the section, "to secure the assessment

of the intangible property belonging to the corporation." The State courts have approved such taxation of intangibles, as well as the rule or process by which the intangible property is separated from the tangible property. Thus, in *State* v. *Bodcaw Lumber Co.*, 128 Ark. 505, the court said:

> The statute expressly provides that intangible as well as tangible values shall be taxed, and shares of stock represent the taxable intangible value, subject to reduction to the extent of the value of the tangible property in the state which is taxed separately.

There is no provision for the assessment of intangibles in connection with farm property or other realty. Section 9919 contains the following limitation:

> Each separate parcel of real property shall be valued at its true market value in money, excluding the value of crops growing thereon.

It is entirely clear, therefore, that the State Tax Commission's assessment of plaintiffs' railroad property is an aggregate of intangible and tangible value. The laws of Arkansas do not require a separate assessment of the two classes of property, as do the statutes of some of the States. This aggregate was used by the local assessors as a basis for their assessment of benefits to the plaintiffs' property. In the assessment book (Rec. 145) the State assessment is given as the "present assessed value" of railroad and other property, as required by section 5421.

It is certain that benefits were assessed against the physical properties of plaintiffs, as well as against their intangible assets. This is so because these physical properties form a part, and probably the larger part, of the assessment made by the State Tax Commission.

It is equally certain that the only benefits claimed to accrue to plaintiffs' property were those which are supposed to arise by reason of a prospective increase in traffic. It appears from the opinions of the State courts that in their judgment an increase in traffic would bring increased profits to the railroad, and so increase its value and justify the assessment. There was no claim that the improvement of the highway would result in any direct benefit to the physical property itself.

We assume, for purposes of the argument, that an increase in traffic and a corresponding increase in profits will increase the total value of a railway property; but if so, we contend that such enhancement in value would accrue only to the intangible property, which depends upon the earning power of the corporation, and would not accrue to its physical property, consisting of rails, ties, buildings and other component parts. The value of the right of way within the district, considered as so many acres of land, would not be benefited or enhanced in value by the paving of the public highway; and the same would be true of other items of physical property within the district. It is likewise apparent that a decrease in the volume of profitable traffic would lower the earning power and the intangible value of the property, but would not affect physical values. If the railroad should "stop," as it might do in the circumstances stated in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U. S. 396, and *Bullock* v. *Florida*, 254 U. S. 513, it is not conceivable that its physical property in the district would be enhanced in value or benefited by the construction or improvement of public highways after its operation had ceased, with no prospect of being again resumed.

The physical property of plaintiffs within the district, considered separate and apart from its earning

power or intangible values, is no more benefited by the improvement than is the Prairie Pipe Line in the district, which was assessed with benefits of $8,300 (Rec. 143), concerning which the lower court said (Rec. 308):

> They have assessed the pipe line at 50 per cent and I can't see any benefit there. If this was a suit by the pipe line, they might say, "We are not benefited by this road." The oil in the pipe, I presume, is going somewhere to be refined and there is no evidence that there is any benefit accruing to the pipe line by reason of this at all.

It is held by the Circuit Court of Appeals for the Eighth Circuit in *Board of Directors* v. *Prairie Pipe Line Co.*, 292 Fed. 474, that the construction of a levee in Miller County, Arkansas, did not benefit the property of a pipe line company. The court said (p. 479):

> We are further of the opinion that the evidence sustains the conclusion of the trial court that the improvement provided for under the acts creating the levee district did not benefit the defendant or its pipe line within the limits of the levee district. In our judgment, the evidence clearly shows that the improvement did not increase either the value of the pipe line or its earning capacity. Whether the improvement might possibly in the future decrease the expense of upkeep and repairs was shown by the evidence to depend upon so many conjectural and fortuitous circumstances as to render any such benefit purely speculative.

The physical property of the pipe line was not benefited, nor was its earning capacity increased. There was, therefore, no benefit either to its physical assets or its intangible value.

If there had been no station on the plaintiffs' line within the district, then its position with respect to benefits would have been the same as the position of the pipe

line company. The railroad and pipe line constitute property within the district, employed in the transportation of commerce across the district. The pipe line receives no benefit from the paving of the highway, perhaps for the reason that the oil being transported has neither origin nor destination within the district. If the railroad had no station within the district, how could it receive any benefit from the improvement? Its trains would pass through without stopping, and none of the commodities transported by it would have either origin or destination within the district. There would be no increase in the value of the railroad or in its earning capacity. Are its railroad tracks, side tracks and buildings enhanced in value by the mere accident of the location of the DeQueen station within the district? If the station buildings were removed to a place outside of the boundaries of the district, is it conceivable that the railroad property within the district would suffer a diminution in value to the extent of $10,635 per mile?

It is difficult to see, therefore, how the physical property of plaintiffs could be benefited by a prospective increase in traffic. If any benefit of this nature could, by any possibility, accrue to plaintiffs' property within the district, it would necessarily accrue to its earning power or intangible value, and not to its physical assets.

The local assessors, however, took the assessment made by the State Tax Commission, which included both tangible and intangible properties, and used this aggregate value in the assessment of benefits, and thereby of necessity imposed benefits upon physical property not benefited thereby. This, we contend, was arbitrary and unwarranted.

This question was not passed upon in *Branson* v. *Bush, supra.* It was not there contended that the physi-

cal property, as distinguished from the aggregate value, was exempt from the imposition of benefits received from a prospective increase in traffic. The case was submitted and decided upon the assumption that the aggregate of both tangibles and intangibles was subject to the assessment of benefits, the claim of appellant being that this created a discrimination in favor of farm property, which was assessed only at its physical value. This claim was denied by this Court on the ground that there was no "basis for assuming that the franchises of the railroad company were added as a separate personal-property value to the assessment of the real property of the company" which resulted in "a higher rate of taxation" on the property of the Railway Company than on the other property in the district.

If there had been in this case a separate assessment of tangible and intangible property, as required by the State of Texas and upheld by this Court in *Baker* v. *Druesedow, supra,* is it not clear that an assessment of benefits supposed to arise from a prospective increase in traffic, based upon the assessment of plaintiffs' physical property within the district, would have been invalid because in violation of the provisions of the Fourteenth Amendment? The fact that in the assessment by the State Tax Commission, tangibles and intangibles are not separated, but are shown in the aggregate, ought not to alter the application of the principle. If they were separated, we would know the exact amount of the property exempted from the assessment. Being stated in the aggregate, we know that a certain portion of the assessment, and doubtless the larger portion, is exempt, and that this exempt property is taxed.

III.

The assessment of benefits against the property of the plaintiffs was relatively unequal and discriminatory because not made on a uniform basis as compared with the assessment of other property, and therefore violated the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

We submit that we have shown, under propositions I and II, that the assessment of benefits against the plaintiffs was so far in excess of any possible benefits, as to be unconstitutional and void, no matter what system of assessment was used, since it is settled that an assessment which exceeds the benefits to the property, or its enhancement in value, cannot be sustained.

We shall also endeavor to show, however, that on the basis ostensibly used by the defendant, the assessments upon the property in the district were so unequal and arbitrary as to invalidate the assessment against the plaintiffs' property. It will probably be useful to summarize, briefly, the testimony as to the basis on which the assessment of benefits was made.

The three assessors, two of the three commissioners, and the engineer of the district, testified as to the method employed in making the assessment.

According to these witnesses, the assessment of property for general taxation was used as the basis for the assessment of benefits (Rec. 152, 246, 301). Farm lands and city lots were, it was said, divided into three zones; namely: zone one was the strip within one mile on each side of the highway; zone two, the strip between one and two miles from the highway; and the remainder was zone three. It was stated that there was a uniform rate applied to farm and city property in each zone, property in zone one being assessed benefits of 60 per

cent of the assessed valuation; property in zone two, 50 per cent; and property in zone three, 40 per cent. (Rec. 152, 301).

One assessor stated that they assessed as benefits *about* 60 per cent., 50 per cent. and 40 per cent. of the assessed value of farm and city property, and, as we shall show, he used the word "about" advisedly. (Rec. 246).

The assessed value of the lands, for purposes of general taxation, ostensibly include the value of any improvements, and consequently it was claimed that the board, by using this assessed value, assessed the improvements as well as the land. It was further stated that the assessed value was generally accepted by them, and no particular attention paid to improvements, unless the assessors knew that an improvement had been put on the land since the last assessment, and that then they added a little. (Rec. 31, 152, 246).

The assessors in some cases "equalized" adjoining tracts, which were of different assessed values but of the same real value, by assessing the same amount of benefits against each tract (Rec. 30), but they generally accepted the assessed value, even if it showed improved and unimproved lands, lying side by side, and of the same character, assessed at the same figure (Rec. 30, 31).

The railroad property of plaintiffs, according to the assessors, was also assessed with benefits on the basis of its assessed value for general taxation, but it is apparent that they did not apply any uniform percentage thereto. Thus, benefits in the sum of $7,000 were assessed against main track, which is 12.926 per cent of the assessed value; benefits in the sum of $5,000 were assessed against side track, which is 17.0940 per cent of the assessed value, and benefits in the sum of $9,270 were assessed against buildings, which is 19.9935 per

cent of their assessed value. The aggregate assessment of $21,270 is 16.4101 per cent of the aggregate assessed value of main track, side track and buildings. It is apparent, therefore, that benefits against railroad property were "lumped off" by the assessors, without the application of any uniform percentage or other uniform rule of apportionment.

The assessors and commissioners stated that, in their opinion, the value of the property of the plaintiffs would be indirectly increased, on account of this road improvement, by a general community benefit, which would increase the value of all the property in the district, but, on further questioning, they stated that the value of the railroad property could be increased only if the amount of traffic over the railroad was increased (Rec. 148, 150, 156, 234, 247, 280, 297, 301, 304).

The assessors and commissioners made no attempt to estimate the amount of increased traffic which they assumed would come to plaintiffs from the improvement of the highway (Rec. 236, 261, 282, 283, 297, 304, 305).

A statement of one of the assessors, which is fairly typical, is the following:

> Q. Now, what estimates or plan did you go upon to ascertain what benefits, if any, would accrue to a railroad property or the railroad property in question? A. We thought any improvement would be a benefit to all property owners in the district.
>
> * * * *
>
> Q. And believing that any improvement of this kind would be a general community benefit, that was your theory? A. Yes, sir.
>
> * * * *
>
> Q. How did you reach the conclusion that railroad property would be benefited at all? A. We thought any improvement would naturally cause more traffic over the railroad.

Q. Then you based your estimates of benefits on the assumption that there would be an increased traffic to this railroad, didn't you? A. Yes, sir.

The witness also stated that the assessors, so far as he knew, gave no consideration to the fact that the DeQueen & Eastern could haul all the products in the district from Lockesburg, and turn them over to the Kansas City Southern at DeQueen, or to the Frisco at Valliant.

Q. Do you know of any way that a highway like this could benefit the railroad property in question, except by giving it more traffic? A. No, sir.

Q. What kind of additional traffic did you estimate that this Kansas City Southern would receive? A. I don't know as we figured on any particular amount.

Q. If you did (not) figure on any amount, how could you estimate any benefit? A. Well, we knew and we all know that highways improve a country and the more it is improved the more traffic a railroad is bound to receive, and by getting more traffic it is bound to receive some benefit (Rec. 260).

The witness further stated that the assessors made no attempt to estimate the amount of increased traffic which would come to The Kansas City Southern Railway Company, or whether the increased traffic would be profitable or not (Rec. 261).

The commissioners advised the assessors how much money, approximately $550,000, it was necessary to raise, in order to improve the highway, and the assessors found the rate, divided the district into zones, and made assessments which would raise the stipulated amount (Rec. 29).

If the commissioners had advised the assessors that the improvement would cost one million dollars, instead

of five hundred thousand dollars, then the assessors would have assessed benefits in double the amount they did assess (Rec. 145).

The assessors were informed by the commissioners that there would be a bond issue of about $200,000, and that the bond people would require something like half a million assessed against the property. The assessors had to make the assessment high enough to satisfy the bond people (Rec. 259).

All the other property was assessed before the railroad property was assessed (Rec. 145).

The above was the testimony of the road district authorities regarding the manner in which the assessment was made.

The most casual inspection of the assessment roll (Rec. 36-142) shows, however, that the assessments could not have been made by assessing benefits of 60 per cent., 50 per cent. and 40 per cent. respectively, upon the assessed value for general taxation.

The first page of the assessment roll (Rec. 32) shows the following:

Owner	Zone	Acre	Assessed Value	Total Benefits	Per Cent. Benefits bear to Assessed Value	Assessed Benefits Per Acre
L. N. Howerton	.	40	120	80	66⅔	2.00
M. E. Barrow	.	40	250	100	40	2.50
P. Daniels	.	40	240	96	40	2.40
Dierks Lumber Co.	.	40	150	80	53⅓	2.00
S. G. Cecil	.	80	300	160	53⅓	2.00
Fannie Campbell	.	80	300	160	53⅓	2.00
James A. Goss	2	80	320	200	62½	2.50
W. F. Woods	.	40	260	130	50	3.25
E. Haughey	.	40	100	100	100	2.50
E. Hendricks	.	40	120	100	83⅓	2.50
E. Haughey	.	40	350	175	50	4.37½
E. Hendricks	.	40	120	100	83⅓	2.50
Thos. J. Nalley	.	40	200	100	50	2.50
Fannie Campbell	3	80	300	160	53⅓	2.00
Sarah A. Snapp	3	80	400	160	40	2.00
Sarah A. Snapp	.	80	300	200	66⅔	2.50
W. W. McReynolds	.	80	400	160	40	2.00
J. K. Barr Est.	.	160	500	360	72	2.25
James A. Goss	.	40	120	100	83⅓	2.50
J. K. Barr Est.	.	80	300	200	66⅔	2.50
Smith & Woods	.	40	100	100	100	2.50
F. D. McClanahan	.	73	350	160	45	2.20
A. K. Allison Est.	.	7	20	20	100	2.85
F. D. McClanahan	.	20	100	50	50	2.50
W. A. Keys	.	20	100	50	50	2.50
W. W. McReynolds	.	40	120	100	83⅓	2.50
W. A. Keys	.	20	90	50	55½	2.50

Attention is first called to the fact that the above assessed values were claimed to include not only the value of the land, but the value of any buildings or other improvements, and yet the average assessed value per acre, including buildings and improvements on the above properties, was only $4.13.

As will be noted further, the zones are designated in only a few instances. On the above table, there is considerable uniformity in the amounts assessed per acre, but the percentages assessed, instead of being uni-

formly 40, 50 and 60 per cent., as claimed, are 40, 45, 50, 53 1/3, 55½, 62½, 66 2/3, 72, 83 1/3 and 100.

The same per cent. was not assessed in the same zone.

Beginning on page 32 of the record, and taking the few instances where the zones are indicated, we find the following:

Owner		Zone	Acres	Ass'd. Value	Benefits	Per cent Ass'd.	Per cent should be	Rate per acre
James A. Goss	(Rec. 32)	2	80	320	200	62½	50	2.50
Fannie Campbell	do	3	80	300	160	53⅓	40	2.00
Sarah A. Snapp	do	3	80	400	160	40	40	2.00
A. J. Ballow	(Rec. 33)	1	80	400	200	50	60	2.50
H. C. Townsend	(Rec. 34)	1	25	150	75	50	60	3.00
H. C. Townsend	do	1	40	250	125	50	60	3.01
Unknown	(Rec. 35)	1	40	400	200	50	60	5.00
W. J. Williamson	(Rec. 36)	1	80	600	300	50	60	3.75
D. E. Moon	do	1	10	20	25	125	60	2.50
J. C. Thomas	do	1	30	180	100	55⅝	60	3.33
E. J. Blackburn	do	1	6	20	15	75	60	2.50
R. F. Jackson	do	2	80	440	225	51	50	2.81

The above tables seem to justify the inquiry whether the alleged percentage assessment was not an afterthought. Certainly there was neither rhyme nor reason in the application of the alleged percentages. The statute requires that the rate of assessment per acre be shown. This appears to have been done, and the figures afterward erased (Rec. 250).

There was a similar lack of uniformity in the application of the percentages of 40, 50 and 60 per cent. in the towns. For instance, the first few assessments of benefits at the top of page 95 of the record show the following:

	Present value	Total benefits	Percentage of Assessed value
Edwards, Lyda	500	300	60
C. P. Coulter	400	240	60
So. L. & T. Co.	1150	960	83
A. J. Clingan	600	600	100
A. J. Clingan	100	60	60
J. T. Henry	150	90	60
C. W. Burkhead	650	480	73
J. T. Henry	150	90	60
Mrs. L. M. Tatum	250	240	96

The assessments of benefits on all the non-railroad property in the town of DeQueen, which, judging from the map, should come in zone one, and be assessed at 60 per cent. were—upon objection being filed, and without any reason therefor being assigned, so far as the record shows—reduced 40 per cent. by the county court (Rec. 9-12, 101-127).

There were some very low assessments of benefits. For instance, on page 124 of the record, E. C. Hayes, on property of the assessed value of $250, was assessed benefits of $12.00, that is, less than 5 per cent. J. S. Whitten and Mike Cullen, on valuations of $100, were each assessed $15.00, or 15 per cent (Rec. 124).

Judging by the percentages, there were also some very high assessments of benefits. For instance, on page 116 of the record it appears that T. Landman was assessed benefits of $900.00 upon property with an assessed valuation of $200.00, in other words, 450 per cent. On page 119 of the record, it appears that Tobin Brothers and Frank Steele were each assessed benefits of 300 per cent. on the assessed value of their property; and on the same page, T. A. McKnight was assessed benefits at the rate of 720 per cent. of the assessed value.

The average assessment of benefits per acre against the farm lands was only $5.24 per acre, and the average

assessed value for taxation, including improvements, was $6.43. That is, there was a total of 64,742.93 acres of farm lands assessed with benefits, as shown by the assessment roll (Rec. 32-142). The total amount of assessed benefits against the same was $339,391, and the total assessed value, $416,463.00.

An examination of the map (Rec. 135) shows that the town of Lockesburg contains something more than 640 acres, and the total assessment of benefits amounted to $31,888. For 600 acres, this would average $53.15 per acre.

Similarly, as shown on the map (Rec. 135), the town of DeQueen occupies 1120 acres, and more than half of it is in the road district, but taking 500 acres, less than one-half of the area of the town, as being in the district, there is an average assessment of $148.71 per acre, since the total assessment of benefits in the town, exclusive of property of plaintiffs used for railroad purposes, was $74,354.40.

With this assessment of an average benefit of $5.24 per acre against the farm lands, there should be compared an assessment of $328 per acre against the 2 miles of main line of railroad belonging to the plaintiffs.

This figure is arrived at in the following manner: 2 miles of main line right of way, 100 feet wide, contain 24.28 acres of land, and the assessment of benefits against the said 2 miles of main line was $7,000.

There was also an assessment of benefits, against 9.34 miles of side track, of $5,000, and against depot buildings, roundhouse and other buildings, of $9,270.

In order to compute the acreage of the land occupied by the buildings, it is necessary to consider the manner in which railroad property is assessed for taxation in Arkansas.

We have already explained, under proposition II of this brief, that, under Section 9974 of Crawford and Moses' Digest of the Statutes of Arkansas, 1921, the Arkansas Tax Commission is required to ascertain the value of all property tangible and intangible, including the franchises (except the right to be a corporation), railroad tracks, rolling stock, water and other stations, passenger and freight depots, office furniture, other property, real and personal, owned by each railroad in the State of Arkansas.

The Tax Commission is required to determine the total value of the entire property of the corporation, tangible and intangible (Section 9975).

Each railroad company is required to file, with the Arkansas Tax Commission, a schedule showing the length of the main line and the length of all the side tracks, switches and turnouts in each county in which the railroad may be located, and each city or town in said county through or in which the railroad may run; also the depots, sectionhouses, roundhouses, machine shops, water tanks, coal chutes and all other buildings and fixtures of every kind used for railroad purposes, and the counties, school districts and towns in which located; also materials, supplies, etc. (Section 9982).

The schedule is required to show, in detail, the true value of the several items listed and also the aggregate value of the whole railroad, taking into consideration the entire right of way as given by the charter of the company or statutes of the state, the franchises, privileges and everything of any character whatever situated upon the right of way of the railroad connected with or appertaining to it in any way which adds to its earning power or gives the railroad value as an entire going thing (Section 9984).

The Commission is required to determine the value, per mile, of main track, the value, per mile, of the side tracks, turnouts and the value of each building, and the section continues with the provisions as to personal property (Section 9987).

The buildings and side tracks of railroads are required to be assessed as real estate, and each building or side track is to be assessed in the incorporated town or district where it is located. The main track is also to be assessed as real estate and it is to be apportioned for assessment and taxation between the several towns and school districts through which the railroad runs according to the actual mileage in each town and district (Section 9989).

It is further provided that all real estate, including buildings and structures thereon, other than that used for railroad purposes, shall be listed and assessed by the assessor in the county where situated at the same time and in the same manner as real estate belonging to individuals is required to be listed and assessed (Section 9990).

Except for the side tracks and buildings, the value of which is to be allocated to the county or town in which located, and the rolling stock, tools and supplies, which are not important here, the entire value of the railroad, tangible and intangible, is divided between the several counties and other taxing sub-divisions on the basis of the main line mileage located in each county or subdivision (Rec. 166-167, 175-176).

The method of assessment is explained as follows in the case of *St. Louis-San Francisco Ry. Co.* v. *Sebastian Bridge District*, 293 Fed. 729, which was also a case involving an assessment of benefits from the construction of a public improvement in the State of Arkansas. The court said:

The third point is that a portion of this property has been subjected to double assessment. The portion intended is a part of a tract in section 9, consisting of 14.68 acres. In making up their assessment list, these assessors included and separately treated and valued ten items: Main line, side track, buildings on right of way and seven separately described pieces of real estate. The above acreage in section 9 was one of these items and the assessment thereon was $2,800. The claim made is that 10.60 acres of the 14.68 acres was also included in the right of way items. In determining the value of the railway property, the assessors took the valuation found by the state tax commission. The state statutes (Crawford & Moses' Digest, Secs. 9974, 9982, 9984, 9986, 9987, 9989 and 9990) require that all property used for railway purposes be assessed, for general taxation, by the commission and that property not so used be assessed locally. Therefore when these assessors took the valuations of the commission, they had the value of all property within the district used for railway purposes. If any part of the above acreage was included therein, then the second inclusion in this acreage item would be duplicated valuation to that extent. Right of way as well as all manner of railway building and yards are included within the above statutes and, therefore, within the valuation of the commission. Also, section 4003 of the same statutes, a portion of the Act on Eminent Domain, declares that:

"The words 'right of way', as used in this act, shall be construed to mean and include all grounds necessary for sidetracks, turnouts, depots, workshops, water stations and other necessary buildings."

The description of properties in the above sections relating to the commission and the argumentative force of the statutory definition of right of way in the eminent domain statute convince that all land used in connection with railway purposes is included in the valuation made by the Commission.

St. L., I. M. & S. R. Co. v. *Miller County*, 67 Ark. 498, 55 S. W. 926. The evidence shows that of this tract of 14.68 acres, 10.60 acres were used as terminal yards containing roundhouse, machine shop, turntable, material storage yards and terminal trackage. This portion was plainly covered by the commission's valuation and should have been excluded from this acreage. This deduction would leave that item as 4.08 acres with assessment of $778.27.

An examination of the assessment roll (Rec. 7-8, 141) shows that in addition to the benefits assessed against the plaintiffs and which are complained of in this suit, there were also other assessments of benefits against lands of the plaintiffs. Property described by lot and block is set forth on pages 7 and 8 of the record and there follow descriptions of property as follows:

NW¼ NE¼ West of Railroad in 19-8-31;
A strip 200 ft. along R. R. in 19-8-31;
SW¼ NE¼ West of K. C. S. Ry. in 19-8-31;
Right of Way of K. C. S. Ry.;
W. 935 ft. of SE¼ except R. of W. 19-8-31.

The acreage of these lands, except the lands described by lot and block, is shown on page 141 of the record, respectively as 16 acres, 6 acres, 24 acres, 5 acres, and 45.40 acres, a total of 96.40 acres. On page 141, the last named tract is described as "W. 935 ft. of SE¼ except 100 ft. R. of W. heretofore named."

Evidently there was a double assessment in assessing the above right of way, since its value was included in the assessment of main line mileage complained of in this case. It is apparent also that the taxing authorities gave a very narrow construction to the term "right of way," as not including the yards and division terminals of the plaintiffs. After such lands had been in-

cluded in the State Tax Commission's assessment in the value of main track, the local assessor again added these lands to the tax roll for purposes of local assessment, resulting in a double assessment for general taxation purposes, and also for the purpose of the assessment of benefits in this case.

In view of this situation, we submit that it would be entirely fair to consider, as a part of the assessment of benefits against the main track, the assessments against the side tracks which were really, in large part, yard tracks of this division terminal and the assessment against the buildings. The total assessment against main track, side tracks and buildings was $21,270, and computed on the above basis, would show an assessment per acre of $876.

If this is not correct, certainly these buildings did not occupy more than 10 acres of land in all, and this would result in an assessment of $927 per acre, since the total assessment of benefits against the buildings was $9270. We do not have the figures as to the acreage of the lands occupied by the side tracks.

Considered simply as land, without regard to the use to which it was being put, the land of the railway companies could only be increased in value, through the general development of the community, to the same extent and in the same manner as the adjoining property of other owners, and yet, as we have shown above, the assessment of benefits against plaintiffs' main line right of way was at the rate of $328 per acre, and, against the adjoining farm land, at an average of $5.24 per acre.

This assessment of benefits against plaintiffs' main line right of way is also to be compared with an assessment of benefits in the town of Lockesburg of $53 per acre, and in the town of DeQueen of $148 per acre. As stated above, the assessment of benefits against the

buildings was at the rate of not less than $927 per acre, and if the benefits assessed against the buildings and side tracks are included in the main line assessment, such assessment amounts to $876 per acre.

Judged as a conventional assessment of benefits, there was gross discrimination against the plaintiffs in assessing their main line property through the country at $328 per acre, as compared with an average assessment of $5.24 per acre against the farm lands, and a similar discrimination in the town.

It will probably be contended, however, that the assessments of benefits were all made by applying certain percentages against the assessed values for general taxation, non-railroad property being assessed 60, 50 or 40 per cent. of the valuation for general taxation, depending on its distance from the highway, and the railroad property of plaintiffs being assessed benefits on an average of only about 16.40 per cent of the assessed value for general taxation.

As shown above, the assessed value of the farm lands averaged $6.43 per acre, and the assessed benefits averaged $5.24 per acre.

The assessed value for general taxation ostensibly included all improvements (Rec. 152). The district is an old, long-settled district (Rec. 242), and the lands have been under cultivation for years (Rec. 291). Obviously, if the country is worth constructing hard surfaced roads in at all, these farm lands have been ridiculously undervalued. One of the assessors testified that the farm lands were worth $25 to $50 per acre (Rec. 277). He testified that all property was assessed for taxation at 50 per cent., but that the real value of some of it was a great deal higher (Rec. 258). A witness for plaintiffs testified, without contradiction, that railroad

property was assessed much higher, relatively, than other property (Rec. 178).

An illustration was given, by one of the assessors, of a farm of 80 acres, with a two-story frame building on it, which was assessed, for general taxation, at $410. Obviously, this was only a fraction of the value of the land, to say nothing of the value of the building. The assessors showed what a farce this method of assessment was by assessing, against this property, benefits of $800, practically 200 per cent. of the assessed valuation (Rec. 274).

One tract of 40 acres, with no buildings on it, belonging to assessor Grady, which may fairly be said to be worth, according to Grady's testimony, at least $50 per acre, was assessed for general taxation at $7.50 per acre; that is, 15 per cent. of its value (Rec. 253).

It is clear that little or no attention was paid to improvements, in making the assessments for general taxation, on the non-railroad property.

As shown by the assessment roll (Rec. 32-144):

Of the 1485 tracts of 10 acres or more,

115	were assessed at	$2.50	per acre,
60	were assessed at	3.00	per acre,
49	were assessed at	3.75	per acre,
81	were assessed at	4.00	per acre,
376	were assessed at	5.00	per acre,
33	were assessed at	6.00	per acre,
51	were assessed at	6.25	per acre,
76	were assessed at	7.50	per acre,
139	were assessed at	10.00	per acre,

All of the above are even figures.

144 tracts were assessed at irregular figures under $5.00 per acre.

143 tracts were assessed at irregular figures under $10.00 per acre.

We find in the well-settled district here under consideration, that tracts of 10 acres or more are commonly assessed from $2.50 to $10 per acre—the majority at $5 per acre—although their market value is at least $25 to $50 per acre. It appears that although the assessors testified that they distinguished between improved and unimproved property in the district, no such distinction was in fact made, because the great bulk of the property in tracts of 10 acres or more was assessed at uniform values of $2.50, $3, $3.75, $5, $7.50 and $10 per acre, which conclusively refutes any contention that the improvements on such property were taken into consideration in assessing the value of such properties.

An inspection of the assessment roll, in this case, further shows that, of 1533 parcels, whose acreage is given, 1439 parcels were assessed benefits ranging from 50 cents to $10 per acre.

But against the plaintiffs, benefits were assessed (Rec. 144) as follows:

	Mileage	Present assessed value	Corrected and assessed benefits
Main tracks	2 miles	$ 54,000	$ 7,000
Side tracks	9 ¾ "	29,250	5,000
Buildings		46,365	9,270
Totals		$129,615	$21,270

We have shown that this resulted in an assessment of several hundred dollars per acre.

The assessment of benefits held void in the case of *Missouri Pacific R. Co.* v. *Road Improvement District No. 1, of Hot Springs County, Arkansas* (C. C. A., 8th Ct.), 288 Fed. 502, bears such a close resemblance to the case under consideration that we feel justified in quoting at length from it. The court said:

The method pursued is shown in exhibit found in the record and here copied, in so far as it relates to section 1 of the road:

"Re-assessment of Railroads in Hot Springs County Road Improvement District No. 1.
Missouri Pacific Railroad Company.

Road	Section	Miles	Zone	County and State Assessed Value	Total Benefits
No. 1	Main track	8	1-2-3	$240,000.00	$14,400.00
	Side track	5.26	1	15,780.00	1,893.60
	Buildings		1	7,120.00	854.40

It is similar in form as to other sections of road, and discloses a variation in per cent. of levy on main track, side tracks and buildings. Special assessments on the basis of benefits rest upon the assumption that the property on which the assessments are made will be enhanced in value, and that the enhancement will fairly equal the assessment it is made to bear. The Act was framed upon that assumption, and the commissioners were empowered to enforce its purpose; but they did not do so; they adopted the assessed valuation as a basis. It is our opinion that in pursuing that method all of their assessments were void. The error came about, we think, by misapplication of the provisions of section 8 of the Act, which we presently consider.

It is urged by appellees that there is no ground for complaint on account of the method of assessment adopted by the board because, it is claimed, farm lands within the district were assessed benefits of 24% of their assessed value for general taxation, while appellant's property was assessed not more than 6 to 12% of its assessed value. But additional facts show there is no merit in this contention, because, from the uncontradicted testimony appellant's property was assessed at a higher per cent. of its value for general taxation than was other property in the district. The proof is that apellant's property was assessed at least 60% of its value. One of the commissioners testified that farm lands in the district were in his judgment assessed as

high as 50% of their value. Two other witnesses, both familiar with land values in Hot Springs County and residents there, testified that farm lands were assessed at not exceeding 25% of their value. One of them was in the real estate business and had loaned a great deal of money on lands in the county. The other had been county clerk and also county judge of the county. Another witness in the employ of appellant testified that he had made an investigation as to the value of lands in that county, and that in his opinion they were taxed at not more than 15% of their value. Appellant's property is assessed for general taxation by state officers, farm lands and town lots by county officers. On this it seems clear that the assessed valuation for general taxation could under no condition be considered a fair basis and safe guide for an equitable and just distribution of these special assessments. The basis used by the commissioners was not only not permissible under the Act, it was also arbitrary, inequitable and grossly unjust. This conclusion is forcibly demonstrated in another way. Appellant's right of way within the district on which its main track, side tracks and buildings are located contains about 500 acres. The benefits assessed against it, figured on this basis, would be a little more than $200 per acre. The uncontradicted proof discloses that farm lands lying along its right of way are assessed total benefits of $2.40 per acre. It is no answer to this unjust and unequal distribution of burdens to say that the farm lands were assessed a benefit of 24% of their assessed value ($10 per acre) for general taxation, while appellant's property was only assessed an average of less than 10% of its assessed value. This resulted in burdening appellant's property for the improvement more than eighty times as much as that placed on farm lands, when the two classes of property are considered as acreage. The result, we thing, demonstrates that the action of the commissioners was "palpably arbitrary and a plain abuse," and violative of the Fourteenth Amendment.

It will be noted that it was proved that the railroad company's property involved in the above case, which was assessed at a value of $30,000 per mile of main track for the purpose of general taxation, was assessed at at least 60 per cent. of its value. The testimony as to the percentage of the true value of the farm lands, which was assessed for purposes of general taxation, varied from 15 per cent. to 50 per cent.

The case of *Thomas* v. *The Kansas City Southern Ry. Co.*, 277 Fed. 708, 261 U. S. 481, involved an assessment of benefits from the construction of a drainage ditch in this same county of Sevier. In that case it was testified that the lands in the drainage district were worth $8.00 to $40.00 per acre and that their value would be more than doubled by the construction of the drainage ditch.

It is evident that, in road district No. 3, while railroad property was assessed for taxation at 50 per cent or more of its true value, farm property was grossly under-assessed, and improved property with buildings on it was generally assessed on substantially the same basis as unimproved property.

The great majority were assessed benefits at 50 cents to $10 per acre. On the other hand, the main line of plaintiffs was assessed benefits at $328 per acre, and property occupied by buildings at $978 per acre.

Furthermore, as stated above, the assessments of benefits on the lots in DeQueen were reduced 40 per cent., thereby increasing the discrimination against plaintiffs, since a corresponding reduction in the assessment against plaintiffs' railroad property in the city of DeQueen was not made. This was a direct damage to plaintiffs since each year, a sufficient levy is made to raise the total sum needed by the road district. Any under assessment or reduction in the assessment of bene-

fits against other property, increases the amount plaintiffs must pay.

No benefits were assessed against property belonging to churches, the county, school districts or cities. (Rec. 34, 42, 54, 70 *et seq.*).

This was held to invalidate such an assessment in the case of *Missouri Pacific* v. *Road Imp. Dist.*, 288 Fed. 502, but it is relatively unimportant.

The method of taxation used by defendants in this case is discriminatory because the railroad property is assessed at a much higher value than is the non-railroad property in the district; because the value of the improvements on the main line right of way are included in the valuation upon which the tax is assessed, when such improvements are only occasionally considered as to non-railroad property, and because there is added thereto a large assessment on account of side tracks and buildings. It is true that in this case there was a claim that the benefits assessed against the property other than railroad property, were based upon the valuation for general taxing purposes, but, as we have shown, this rule was more honored in the breach than in the observance; and the assessment of lands for general taxing purposes was so low as to make it out of proportion with the value fixed upon railroad property.

The result is the same in principle as that reached in the case of *Kansas City Southern Railway Company* v. *Road Improvement District No. 6, of Little River County, Arkansas*, 256 U. S. 660, which was reversed by this Court on the ground that the assessment was so palpably discriminatory and arbitrary as to amount to a denial of the equal protection of the law. The position taken by this Court in that case is, as we see it, equally con-

trolling in this case. It was there said of this same Arkansas statute:

> The statute under consideration prescribes no definite standard for determining benefits from proposed improvements. The assesors made estimates as to farm lands and town lots according to area and position, and wholly without regard to their value, improvements thereon, or their present or prospective use. On the other hand, disregarding both area and position, they undertook to estimate benefits to the property of plaintiffs in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would enhance its value, considered as a component part of the system.
>
> Obviously, the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. Benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results. To say that 9.7 miles of railroad in a purely farming section, treated as an aliquot part of the whole system, will receive benefits amounting to $67,900 from the construction of 11.2 miles of gravel road seems wholly improbable, if not impossible. Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 416, 62 L. ed. 989, 990, 40 Sup. Ct. Rep. 560. It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvements upon a basis so wholly different

from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all.

In *Thomas* v. *Kansas City Southern Ry. Co.*, 277 Fed. 708, 712, an assessment made by a drainage district was set aside as being arbitrary and unjust. In discussing the assessment the court said:

> The basis of valuation here employed for benefits is the valuation of all property within the district for general taxation. General taxation and assessments for special benefits are essentially different in their basic characteristics and their legal theories. One is grounded upon the idea that all property should bear a proportion based upon value of the burden of general taxation; the other is grounded upon the idea that property actually benefited by a public improvement should respond in proportion to the benefit so received. Obviously, any connection between the value of a given piece of property for general taxation and its value for benefit assessment taxation is purely accidental.

On this proposition we say that if the assessment was, in fact, on the basis of area and location, as it appears to have been, the plaintiffs' property was grossly overassessed, as shown by the above figures.

If the assessment was on the basis of the assessed value for taxation (and we do not admit that that would form the proper basis for the assessment of benefits in any case), the record shows that non-railroad property was systematically so undervalued, as compared with railroad property, that it could not produce substantially correct results. Furthermore, as we have shown, the announced rules for making the assessment were constantly departed from.

This assessment offends against the rules stated in the following cases:

In *Thornton* v. *Road Imp. Dist.*, 291 Fed. 527, it was said of a road district in which no benefits were assessed against a considerable amount of real estate within the district:

> Nor could this disproportionate, clearly excessive, and arbitrary assessment and taxation stand if the statutes of Arkansas had authorized or permitted the assessors or commissioners to make a just, fair, and equitable assessment upon and taxation all the property benefited, or if this court is mistaken in its interpretation of the statutes and they did empower those officers to make such an assessment and taxation. And that because those officers have made and the defendants are proceeding to enforce this disproportionate, arbitrary, and excessive assessment and taxation, and—
>
> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 361, 369, 373, 374, 6 Sup. Ct. 1064, 1073 (30 L. Ed. 220).

In *Raymond* v. *Chicago Union Traction Company*, 207 U. S. 20, it was said:

> Assessing the franchises and other property of certain corporations at a different rate and by a different method from that employed for other corporations of the same class for the same year, which results in enormous disparity and discrimination, denies the due process of law and equal protection of the laws protected by U. S. Const., 14th Amend. against impairment by a State.

In *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, it was said:

> It is unnecessary to say that the "equal protection of the laws" required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation. . . . But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

In *Gast Realty & Inv. Co.* v. *Schneider*, 240 U. S. 55, it was said:

> The legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse. *Houck* v. *Little River Drainage Dist.*, 239 U. S. 254, 262, 60 L. Ed. 526, 36 Sup. Ct. Rep. 58. The front-foot rule has been sanctioned for the cost of paving a street. In such a case it is not likely that the cost will exceed the benefit, and the law does not attempt an imaginary exactness, or go beyond the reasonable probabilities. . . .
>
> But, as is implied by *Houck* v. *Little River Drainage Dist.*, if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact. *Martin* v. *District of Columbia*, 205 U. S. 135, 139, 51 L. Ed. 743, 744, 27 Sup. Ct. Rep. 440.

The assessment of benefits, in this case, was entirely arbitrary, and not calculated to produce substantially correct results. The assessors stated that the only benefit to plaintiffs' property must be such as resulted from

increased earnings, but their percentage bore no relation to any estimate of increased earnings. As the record shows, the percentage might as well have been 5 per cent. or 25 per cent., or 75 per cent., and, no doubt, would have been any of those amounts, if needed to produce the balance required by the commissioners.

There was included an assessment of $9,270 against buildings. These buildings were treated separately for purposes of local taxation. We question seriously, even aside from what is said in propositions I and II, and which contain our view of the matter, whether buildings can ever be said to have their value enhanced by a public improvement. The value of a building is its cost of replacement. The land may be enhanced in value, or, more correctly, the earning power of the property may be enhanced in value, but the value of the buildings is not enhanced; and, for the same reason, the value of the so-called side-tracks was not enhanced, and they should not have been included.

But to conclude on this point, the Supreme Court of Arkansas stated that the railroad property "was assessed at the actual benefits." As agreed by the assessors and commissioners, the only benefits the railroad companies could receive, must be through increased earnings. The district was, therefore, required to adopt some method which was reasonably calculated to ascertain the amount of increased earnings and enhancement of value therefrom. Since it did not do this, and chose an arbitrary amount, with no basis whatever except that some such percentage had been chosen in other road districts (Rec. 146, 148-150), and which resulted in an excessive assessment of benefits, the assessment was unconstitutional and void.

IV.

The special act of the Legislature of Arkansas which attempted to validate and confirm the assessment of benefits as made by the Road Improvement District, could not cure the defects in the assessment.

After the assessment was made by Road Improvement District No. 3, a special act of the legislature of Arkansas was passed, which attempted to validate and confirm the assessment of benefits as made. Any such act could not, however, validate an assessment that is repugnant to the provisions of the Constitution. In the case of *Thibault* v. *McHaney*, 119 Ark. 188, the Supreme Court of Arkansas said:

> Where the uncontroverted facts show, as they do here, that the estimated cost of the improvement contemplated, exceeds the benefits to be derived therefrom, an Act of the legislature validating an assessment for such improvement would be arbitrary and unconstitutional.
>
> *Peavy* v. *City of Little Rock*, 32 Ark. 31;
> *Coffman* v. *St. Francis Drainage Dist.*, 83 Ark. 54;
> *Kirst* v. *Street Imp. Dist.*, 86 Ark. 1.

In *Thornton* v. *Road Improvement District No.* 1, 291 Fed. 518, 527, an assessment of an Arkansas Road district was annulled. It was sought in that case to uphold the assessment because the assessment had been approved by subsequent acts of the legislature. In disposing of this contention the court said:

> "But this is a grossly disproportionate, arbitrary and excessive assessment of benefits, and the taxation based upon it does not constitute that due process of law without which the constitution of the United States prohibits the taxing of the property of the owner without compensation for public use, and no approving acts or fiats of the legislature of a state enacted without notice to the owners of the

property and without opportunity to be heard by any tribunal upon the merits of the issue, could constitute such assessments and such taxation, or the act or acts which approved them, due process of law, or relieve the assessment and taxation from the grossly disproportionate, arbitrary and excessive character which brings them under the ban of the fourteenth amendment to the constitution."

In *Road Improvement District No. 2* v. *Missouri Pacific Railroad Company*, 275 Fed. 600, 607, it was sought to uphold an arbitrary assessment because it had been approved by the legislature of the state. In denying this contention, the court said:

"But in the case in hand the legislature did not undertake itself to make the assessment on the property in this district, but it delegated that power to and imposed that duty upon the board of the district. And when the legislature delegates to a board or to commissioners the determination of the question what lands will be benefited or what the amount of benefits to such lands will be, the inquiry is in its nature, judicial, in such a sense that property owners are entitled to a hearing or an opportunity to be heard after notice before these questions are determined."

Thomas v. *Kansas City Southern Ry. Co.*, 261 U. S. 481, 43 Sup. Ct. 440;

Houck v. *Little River Drainage District*, 239 U. S. 254.

For the above reasons, the decision in this case should be reversed.

Respectfully submitted,

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